

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

NMT Medical, Inc.,

Plaintiff,

Civil Action # 04-12565 NG

v.

**REQUEST FOR
ORAL ARGUMENT**

AGA Medical Corporation

Defendant.

**DEFENDANT AGA MEDICAL CORP.'S MOTION TO DISMISS OR, IN THE
ALTERNATIVE, TO TRANSFER VENUE TO THE U. S. DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA**

Defendant AGA Medical Corp. ("AGA"), by and through its undersigned counsel, hereby moves the Court to dismiss the instant case or, in the alternative, to transfer venue to the U.S. District Court for the District of Minnesota. As more fully discussed in the Memorandum in Support of Defendant's Motion to Dismiss, or, in the Alternative, to Transfer Venue to the U.S. District Court For the District of Minnesota, filed contemporaneously herewith, the grounds for this motion are as follows:

1. The Court should dismiss this case pursuant to the "first-to-file" rule or the Federal Comity Doctrine. AGA filed a declaratory judgment action in the U.S. District Court for the District of Minnesota captioned AGA Medical Corp. v. Nitinol Medical Technologies, Inc. et al 04-cv-4486-JMR-FLN (D. Minn. Oct. 13, 2004). This declaratory judgment action was filed eight weeks before the present action was filed, involves the same parties, and the same issues. At the time of filing, AGA had an objectively reasonable apprehension of being sued by Plaintiff NMT Medical, Inc. ("NMT" formerly Nitinol Medical Technologies, Inc.). Accordingly, the

Court should decline jurisdiction over this action, and allow the parties to proceed in Minnesota pursuant to the “first-to-file” rule.

2. In the alternative, the Court should transfer this case pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the District of Minnesota where the declaratory judgment action is now pending. Transfer is appropriate because: (1) AGA is a Minnesota corporation; (2) NMT has availed itself of and consented to jurisdiction and venue in Minnesota through its filing of another, unrelated case; and (3) AGA will rely on Minnesota witnesses who are not parties to the present lawsuit to show non-infringement and invalidity of the patent-in-suit.

3. Accordingly, AGA respectfully requests that the Court dismiss this action or, in the alternative, transfer the case to the United States District Court for the District of Minnesota.

Respectfully submitted,

Dated: March 3, 2005

/s/ James T. Nikolai

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AGA MEDICAL CORPORATION

CERTIFICATION PURSUANT TO LOCAL RULE 7.1

I hereby certify that I have conferred with opposing counsel and have attempted in good faith to resolve or narrow the issues presented by this motion.

/s/ James T. Nikolai

James T. Nikolai

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

NMT Medical, Inc.,

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v.

Civil Action # 04-12565 NG

AGA Medical Corporation

Defendant.

[PROPOSED] ORDER

On _____, Defendant AGA Medical Corp. (“AGA”), moved this court to dismiss this action in view of the first-filed declaratory judgment action pending in the U. S. District Court for the District of Minnesota under the caption AGA Medical Corp. v. Nitinol Medical Technologies, Inc. et al 04-cv-4486-JMR-FLN (D. Minn. Oct. 13, 2004). In the alternative, AGA seeks an order to transfer venue to the U. S. District Court for the District of Minnesota. The court has considered the papers submitted in support of and in opposition to the motion, the authorities cited by the parties, and the argument of counsel.

After due deliberation, this court has determined that this court is not a proper venue for this action and that it would be in the interests of justice to dismiss this case and allow the parties to proceed in the U. S. District Court for the District of Minnesota. Even if the court was a proper venue for the trial of this action, the convenience of parties and witnesses would be served by the U. S. District Court for the District of Minnesota.

NOW, THEREFORE, IT IS ORDERED that:

1. Defendant AGA Medical Corp's motion to dismiss this case in favor of the first-filed declaratory judgment action pending in the U. S. District Court for the District of Minnesota is GRANTED.

Dated: _____

Hon. Nancy Gertner
U.S. DISTRICT COURT JUDGE